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No. 425

In the Supreme Court of the United States

OCTOBER TERM, 1970

SCHLESSLIN & CO., ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CUSTOMS AND PATENT APPEALS

MEMORANDUM FOR THE UNITED STATES

ERWIN N. GRISWOLD,
Solicitor General,
Department of Justice,
Washington, D.C. 20530.

In the Supreme Court of the United States

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MEMORANDUM FOR THE UNITED STATES

At the request of the Department of State, I am transmitting a Note to it from the Embassy of Ireland (with attachments) relating to the above case. The views of the United States on this case will be set forth in a separate response to the petition.

Respectfully submitted.

ERWIN N. GRISWOLD,
Solicitor General.

AUGUST 1970.

AMBASÁID NA hÉIREANN
EMBASSY OF IRELAND
Washington, D.C.

The Ambassador of Ireland presents his compliments to the Honorable the Secretary of State and,

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with reference to previous correspondence regarding the imposition of excise tax and import duty on distilled spirits from Ireland imported to the United States in bottle and to the case of *Schieffelin et al. v. the United States*, has the honour to refer particularly to the Treaty of Friendship, Commerce and Navigation between the United States and Ireland, done at Dublin in 1950.

The Government of Ireland have already expressed the opinion that the present United States' method of assessing tax and duty on bottled imports of Irish whiskey is contrary to the proper interpretation of the relevant provisions of the Treaty of Friendship, Commerce and Navigation between the United States and Ireland, done at Dublin in 1950. This view and the bases thereof were summarised in the Note and Memorandum of 21 December, 1967 to the then Secretary of State, who kindly arranged through the Department of Justice for them to be brought to the attention of the United States Customs Court in its consideration of the Schieffelin case.

The Ambassador of Ireland now understands that a petition will be filed in the United States Supreme Court for the purpose of seeking review of the decision in the Schieffelin case. The Government of Ireland would be grateful if the Secretary of State would be good enough to bring the arguments in the attached Memoranda to the attention of the United States Supreme Court in order to aid it in considering the issues raised in the case.

The Ambassador of Ireland avails himself of this opportunity to renew to the Honorable the Secretary of States the assurances of his highest consideration.

[SEAL]

22 JULY, 1970.

MEMORANDUM BY THE GOVERNMENT OF IRELAND

The Note and Memorandum of 21 December, 1967 from the Ambassador of Ireland to the Secretary of State, set forth the view of the Government of Ireland on the proper construction of the Treaty of Friendship, Commerce and Navigation, between Ireland and the United States and in particular in relation to the taxation of Irish whiskey on importation into the United States in bottles. A copy of that Note and Memorandum is attached hereto. Moreover, the records of the Government of Ireland relating to the negotiation of said Treaty contain no evidence of an agreed interpretation or separate understanding that the provisions thereof are to be interpreted otherwise than as indicated in the said Note and Memorandum.

The Government of Ireland are, however, aware that the United States Lower Courts have in fact construed the Treaty otherwise and that in consequence of these decisions imports of Irish whiskey in bottles into the United States will be taxed at a higher rate than nationally produced whiskey. In the Government's view, this is a misinterpretation of the Treaty involving loss of important and valuable rights due under it to Ireland and her nationals.

The Government of Ireland understand that the decisions of the Lower Courts will be submitted for review to the United States Supreme Court. It is their earnest wish that their views be brought to the attention of the Supreme Court.

Washington, D.C.,
22 July, 1970.

AMBASÁID NA hÉIREANN
EMBASSY OF IRELAND
Washington, D.C.

The Ambassador of Ireland presents his compliments to the Honorable the Secretary of State and has the honour to refer to the Aide Mémoire presented by him to Under Secretary of State Eugene V. Rostow on November 13, 1967, in relation to the imposition of excise tax and import duty on distilled spirits imported in bottle. In that Aide Mémorie it was stated that the Government of Ireland view the present method of taxation in this matter as discriminatory and contrary to their Treaty rights and consider that there are persuasive legal arguments to support this view.

Attached hereto is a memorandum containing an outline of the legal arguments which the Government of Ireland are advised should apply to the proper interpretation of the relevant provisions of the Treaty of Friendship, Commerce and Navigation between the United States and Ireland done at Dublin in 1950.

The Government of Ireland would be grateful if the Secretary of State would be good enough to bring

the arguments in the attached memorandum and in the Aide Mémoire referred to, to the attention of the United States Customs Court in accordance with established procedure in order to aid it in determining the issues raised in the case of Schieffelin et al. V United States and also to the attention of the parties to that case.

[SEAL]

DECEMBER 21, 1967.

ASSESSMENT OF EXCISE TAX ON IRISH WHISKEY

The United States authorities at present impose excise tax on Irish whiskey imported into the United States under proof in bottles on a wine gallon basis, that is to say by volume, instead of on a proof gallon basis, by alcoholic content. It is the view of the Government of Ireland that under the provisions of the Treaty of Friendship, Commerce and Navigation between Ireland and the United States, concluded in 1950, excise tax should be imposed on a proof gallon basis, as is the case with whiskey produced in the United States.

Article XVI of the Treaty of Friendship, Commerce and Navigation provides in par. 1:—

> "Products of either Party shall be accorded, within the territories of the other Party, national * * * treatment in all matters affecting internal taxation * * *"

Article XXI defines the term "national treatment" in par. 1 as meaning—

> "* * * treatment accorded within the territories of a Party upon terms no less favourable

than the treatment accorded therein, in like situations, to nationals, companies, products, vessels or other objects, as the case may be, of such Party".

Article XX contains general exceptions to the provisions of the Treaty, none of which appear to apply to the question under consideration. In particular, par. 2 permits—

> "* * * action by either Party which is required or specifically permitted by the General Agreement on Tariffs and Trade * * * during such time as such Party is a contracting Party to the General Agreement * * *"

The General Agreement does not, however, require or specifically permit any action in conflict with the obligations under Article XVI and XXI of the Treaty. On the contrary Article III of the General Agreement prohibits action of that nature.

The Government of Ireland is, of course, aware that in the Protocol of Provisional Application whereby the Government of the United States acceded to the General Agreement, they undertake to apply Part II of the Agreement "to the fullest extent not inconsistent with existing legislation". While this stipulation provides for modified application of the terms of the General Agreement between the Parties to the Protocol (pending the entry into force of the Agreement), it does not amend the provisions of the General Agreement, which alone is referred to in Article XX (2) of the Treaty of Friendship, Commerce and Navigation. The Government of Ireland are therefore

satisfied that the obligations assumed under Articles XVI (1) and XXI (1) of the Treaty are unaffected by the provisions of Article XX.

As excise duty is imposed on whiskey produced domestically in the United States on a proof gallon basis, it is the view of the Government of Ireland that under the provisions of the Treaty of Friendship, Commerce and Navigation as quoted above excise duty should be imposed on imported bottled Irish whiskey on a proof gallon basis also.

Washington, D.C.,
December 21, 1967.

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